

jurisdiction to determine the availability of information under the Open Records Act.¹ Section 7(b) of the Open Records Act provides that upon receipt of a request for a decision submitted pursuant to section 7(a) of the Open Records Act, "[t]he attorney general shall forthwith render a decision . . . to determine whether the requested information is a public record or within one of" the exceptions to required public disclosure enumerated in section 3(a) of the Open Records Act.² As you have submitted a request to this office pursuant to section 7(a), this office is *required* to render a decision.³

Section 7(a) of the Open Records Act requires a governmental body to release requested information or to request a decision from the attorney general within ten days of receiving a request for information the governmental body wishes to withhold. You received the first request for information under the Open Records Act on January 4, 1993, and subsequent requests on January 8, 1993, February 12, 1993, February 17, 1993, and June 1, 1993. We received your request for a decision regarding the requested information in a letter dated June 11, 1993. Consequently, you failed to request a decision within the ten days required by section 7(a) of the act.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling reason to withhold the information to overcome this presumption. See Open Records Decision No. 319 at 1. Normally, the presumption of openness can be overcome only by a compelling demonstration that the information should not be released

¹We note that in your objection to the subpoena, you argue that the subpoena "appears to be an attempt to avoid paying the costs and expenses of obtaining documents from an agency of the State of Texas pursuant to the Open Records Act." You also object to the subpoena on the grounds that "the information requested in the subpoena is in part duplicative of an Open Records Act request previously made by counsel for AT/Comm." Furthermore, we understand that the requestor has withdrawn the subpoena and notified your office of this action in a letter dated June 17, 1993. Therefore, your argument that the federal court has exclusive jurisdiction is no longer applicable.

²The Open Records Act applies to "[a]ll information collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business." V.T.C.S. art. 6252-17a, § 3(a). The authority is clearly a governmental body encompassed by the Open Records Act, see *id.*, § 2(1), and the records at issue here are clearly "public records."

³Of course, a decision rendered by this office pursuant to section 7(b) should not be viewed as an attempt to enforce a subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure; only the federal court has such authority. See Fed. R. Civ. Proc. § 45(c)(2)(B).

to the public, *i.e.*, that the information is deemed confidential by some other source of law or that third party interests are at stake. Open Records Decision No. 150 (1977). You claim that the lane audit reports are excepted from required public disclosure by sections 3(a)(1), 3(a)(7), and 3(a)(8) of the Open Records Act.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that section 3(a)(1) applies in this instance because release of the requested information "would enable unscrupulous individuals to take unfair advantage of a service provided by a government body." As support for this assertion, you cite a number of previous determinations issued by this office, including Attorney General Opinion H-483 (1974) and Open Records Decision Nos. 581 (1990) and 401 (1983). In Attorney General Opinion H-483 at 2, this office found that statutes requiring the governmental body to administer board exams implied the authority to maintain the confidentiality of board exam questions. In Open Records Decision 401 at 5-7, this office held that computer programs were excepted from required public disclosure under section 3(a)(1), again implying confidentiality where no statute expressly required it. In Open Records Decision No. 581 at 6, this office expressly overruled the rationale in Open Records Decision No. 401, holding that because computer programs were not subject to the Open Records Act, it was not necessary to find implied confidentiality under section 3(a)(1). As implied confidentiality is no longer a basis for withholding information under section 3(a)(1) of the Open Records Act, we reject your contention that the requested information must be withheld in order to thwart the intentions of "unscrupulous individuals."⁴

You also assert that section 3(a)(1) applies to protect proprietary information. You argue that "[r]elease of the lane audit reports would not only threaten the Authority's proprietary interest, but would also threaten the proprietary interests of Tollway bondholders." The proprietary interests of governmental bodies are generally protected by section 3(a)(4), not by section 3(a)(1). *See* Open Records Decision No. 592 (1991). As you have not asserted section 3(a)(4), you have waived your right to do so. *See* Open Records Decision No. 363 (1983). The proprietary interests of third parties are protected by section 3(a)(10), which excepts from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The information at issue here was not obtained from third parties, but was generated by a governmental

⁴We note as well that section 4(c) of the Open Records Act requires governmental bodies to "treat each request for information uniformly." V.T.C.S. art. 6252-17a, § 4(c). Thus, whether a requestor is, in your opinion, "unscrupulous" is immaterial in the context of the Open Records Act.

body. Therefore, section 3(a)(10) is inapplicable here.⁵ We conclude, therefore, that the lane audit reports may not be withheld from required public disclosure under section 3(a)(1) of the Open Records Act.

You also assert that section 3(a)(7) of the Open Records Act, in conjunction with a stipulated protective order, makes the lane audit reports confidential. The protective order at issue here was entered into by AmTech Corporation and AT/Comm Incorporated, two private parties currently in litigation with one another in federal district court. The authority is not a party to this litigation, nor has it entered into the protective order. Moreover, we do not understand the protective order to encompass information in the authority's possession. As the authority is not bound by the protective order, we conclude that the requested lane audit reports may not be withheld from required public disclosure under section 3(a)(7) of the Open Records Act.

Finally, you claim that the requested information is excepted from required public disclosure by section 3(a)(8) of the Open Records Act, the so-called "law enforcement exception." In Open Records Decision No. 586 (1991), this office determined that the need of a governmental body may in appropriate circumstances constitute a compelling reason for non-disclosure of information under section 3(a)(8). In this instance, however, we find that you have not made a compelling demonstration sufficient to overcome the heightened presumption of openness arising from your failure to timely request a decision of this office. Accordingly, the lane audit reports may not be withheld under section 3(a)(8). Under the Open Records Act, the requested information must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/jmn

⁵In support of your contention that the requested information is made confidential under section 3(a)(1) as proprietary information, you refer us to Open Records, Decision No. 497 (1988). In that decision, however, a statute expressly made the requested information confidential.

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